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No. 07-266

IN THE
SUPREME COURT OF THE UNITED STATES

PERFECT 10, Inc., a California corporation,

Petitioner

v.

CC BILL LLC; CAVECREEK WHOLESALE INTERNET EXCHANGE, d/b/a CWIE, LLC,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF SCREEN ACTORS GUILD, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Screen Actors Guild ("SAG" or the "Guild") is the nation's largest labor union representing working actors. Established in 1933, the Guild represents more than 120,000 working actors in film, television, industrials, commercials, music videos, and new media. The Guild exists to protect and enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights.

The Guild has collective bargaining agreements with all of the major motion picture, and television production companies, television networks, and/or commercial producers. These collective bargaining agreements govern the wages, hours, and working conditions of the Unions' members. They also provide certain protections for the right of publicity in the form of provisions requiring a producer to obtain the performer's permission prior to reusing footage from any signatory project in any other manner other than initially intended

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. The parties have consented to the filing of this brief. A stipulation between the parties consenting to the filing of this brief is on file with the Court and a copy is attached hereto.

The Guild has long fought to preserve the rights of performers and others in their image, name, likeness, and reputation including through legislative efforts and provisions in the Guild's collective bargaining agreements. In furtherance of those aims, the Guild is a co-sponsor of current California Senate Bill 771 which would restore post-mortem rights of publicity for individuals who died prior to the enactment of California Civil Code Section 3344 ("Section 3344").

The questions presented in Perfect 10, Inc.'s ("Perfect 10") petition are of tremendous interest to the Guild's members and others who may benefit from the Guild's protections. The Guild's members, like countless other public figures, rely on laws such as California's right of publicity laws to protect some of their most valuable assets including their name, likeness and reputation. As misuse of these assets by unauthorized parties could have a significant effect on a performer's career and financial interests, the Guild and its members have a fundamental interest in ensuring these protections are not eroded.

SUMMARY OF ARGUMENT

At any given point of time, there are tens, if not hundreds, of thousands of individuals, including among them actors, models, athletes, spokespersons, and countless other professionals who are actively making, or are attempting to make, a career and living through the use of their names, likenesses, images, reputations and personas in a public forum.

The very cornerstone of their careers is their ability to exploit their rights in these intangible, but often very valuable, assets. Critical to this ability are the protections embodied in the rights of publicity laws in at least twenty-eight (28) states which are intended to ensure that these public figures have the sole right to control how they are exploited. J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 6:7 (2d ed. 2007)

Petitioner in the instant matter, Perfect 10, brought suit alleging, *inter alia*, violation of its models' rights of publicity (which had been assigned to Perfect 10), arising from the unauthorized commercial use of the models' names and images. Respondents asserted a claim of immunity based on Section 230 of the Communication Decency Act ("CDA"), 47 U.S.C. §230 (hereinafter "Section 230"), which had not heretofore been applied to rights of publicity claims. Although the right of publicity has long been recognized as an intellectual property right, the Ninth Circuit held that Section 230 immunized Respondents for the alleged right of publicity violations.

Section 230 immunizes interactive computer services, often referred to as Internet Service Providers ("ISP"), in certain circumstances from tort-based claims. The immunity is restricted such that it is not to expand or limit any laws pertaining to intellectual property, and is not to be construed in a manner limiting state laws that are not inconsistent with it. In the instant matter, the Ninth Circuit did

just that – it inserted the word "Federal" before the phrase "intellectual property," effectively cutting off any claims based on a state intellectual property law.

A significant consequence of the Ninth Circuit's Opinion is the erosion of a critical protection relied upon by performers, models, athletes and other public figures whose names, reputations, and likenesses may have value. The Ninth Circuit ignored the plain language of Section 230, in the process greatly expanding the scope of an immunity that was intended to promote progress on the Internet by immunizing ISP's for speech-based torts committed by their users. In doing so, it eviscerated state intellectual property laws, including the rights of publicity at issue in this matter, and gave new and expanded protection to those who would infringe upon, or aid and abet infringement of, those rights, including those who would reap profit from the unauthorized use of another's name, reputation, or likeness.

SAG therefore urges this Court to grant the petition for a writ of certiorari.

ARGUMENT

I. The Ninth Circuit's Opinion Jeopardizes a Critical Protection for Individuals in the Public Eye

A. Section 230 Was Intended to Immunize ISPs Against Liability for Their Users' Speech

Section 230 includes a limited grant of immunity for ISPs in two ways. It grants immunity from civil liability for actions taken in good faith to restrict access to, or to give others the tools to restrict access to, certain types of content, and it provides that no ISP "shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c). It is the latter form of immunity that is at issue in this case.

The original purpose and intent of Section 230 was to address the threat that certain tort-based lawsuits posed to freedom of speech on what was still a newly developing Internet. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Section 230 was passed in response to *Stratton-Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. Lexis 229, 1995 WL 323710 (N.Y. Sup. Ct. 1995), in which an ISP was held strictly liable for defamatory statements made by one of its users, in large part as a way to remove disincentives to self-regulation created by that case. *Zeran*, 129 F.3d 327, 331. Not

surprisingly, most of the cases, including *Zeran*,[2] in which immunity has been granted under Section 230 have involved some form of defamation. *See also, Batzel* v. Smith, 333 F.3d 1018 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (involving a defamatory email accusing a woman's family of Nazi past); *Ben Ezra, Weinstein, and Co., Inc. v, America Online Inc.*, 206 F.3d 980 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000) (action for defamation regarding incorrect stock information). That Section 230's immunity was intended to apply to speech-based torts is even more apparent in Congress' use of the term "publisher" which derives its significance in the context of defamation law. *Zeran,* 129 F.3d 327, 332. *See also Carafano v. Metrosplash.com*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("Through this provision, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.").

B. Section 230 Does Not Apply To Claims Related to Intellectual Property

Section 230 makes clear that where a claim involves an intellectual property right, there is no greater immunity than would be provided under the laws pertaining to that right. This is the case even if it the claim arises under state intellectual property law. Section 230 (e) states, *inter alia*:

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[2] *Zeran* involved the distribution of defamatory material, specifically, falsely identifying the wrong person as responsible for selling Oklahoma bombing T-shirts. *Zeran*, 129 F.3d 327.

> (2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.
> (3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.
>
> 47 U.S.C. §230(e)

There have been few cases interpreting the relationship between Section 230 and intellectual property claims arising under state law. The primary case on point, *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp.2d 409 (S.D.N.Y. 2001), addressed the application of Section 230 to a state trademark claim. The court in *Gucci*, after carefully analyzing the plain language of Section 230(e), refused to grant immunity to an internet service provider who provided Internet service to an individual who was infringing upon the plaintiff's state and federal intellectual property rights. *Id.* at 412-414. The *Gucci* court specifically stated that immunizing the internet service provider defendant "would 'limit' the laws pertaining to intellectual property in contravention of §230(e)(2)." *Id.* at 413.

C. The Right of Publicity is an Intellectual Property Right

The right of publicity is a form of intellectual property.[3] Although derived originally from laws protecting one's privacy, the right of publicity has evolved into a protection of the proprietary interest in an individuals name, likeness, persona, and other traits as defined by the various states. *See, e.g. KNB Enters. v. Matthews*, 78 Cal. App. 4th 362 (2000). Eighteen states now have codified statutes protecting the individual's right of publicity, while ten others have recognized it in case law.[4]

This very Court recognized the intellectual property nature of rights of publicity three decades ago. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court stated that the right of publicity "protect[s] the proprietary interest of the

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[3] Black's Law Dictionary defines intellectual property as including: "1. A category of intangible rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright and patent rights, but also includes trade secret rights, publicity rights, moral rights, and rights against unfair competition." *Black's Law Dictionary* 932 (8th ed. 2004).

[4] California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wisconsin all have some form of a codified right of publicity law. A common law right is recognized in states including Alabama, Arizona, Connecticut, Georgia, Hawaii, Michigan, Minnesota, Missouri, New Jersey, and Utah. J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 6:7 (2d ed. 2007)

individual" and is "closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." *Zacchini*, 433 U.S. at 573. Although the right of publicity had not fully evolved into an intellectual property right by the time *Zacchini* was decided, the Court clearly recognized that its nature was tantamount to one.

Following *Zacchini*, the right of publicity continued to evolve and, like many states, the federal circuit courts, eventually clearly identified it as an intellectual property right. In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996), the Tenth Circuit noted that the right of publicity is an "intellectual property right" and that, "[l]ike trademark and copyright, the right of publicity involves a cognizable property interest." Additionally, in *Allison v. Vintage Sports Plaques*, 136 F.3d 1443 (11th Cir. 1998), the Eleventh Circuit applied the "'first-sale doctrine,' a well-established limitation on intellectual property rights," to the right of publicity. More recently, in *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 928 (6th Cir. 2003), the Sixth Circuit held that "[t]he right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity."

As this case arises in California, it is important to note that the California Supreme Court

has specifically identified the right of publicity as an intellectual property right. Chief Justice Bird first recognized this property right in her dissent in *Lugosi v. Universal Pictures* nearly three decades ago: "Since the right of publicity recognizes an interest in intangible property similar in many respects to creations protected by copyright law, that body of law is instructive. *Lugosi v. Universal Pictures, Inc.* 25 Cal. 3d 813 (1979), *citing, Zacchini,* 433 U.S. 562 at 573. As in the federal courts, the recognition of rights of publicity as intellectual property continued to grow and evolve. For example, in 2001, the California Supreme Court clearly stated that "[t]he right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility." *Comedy III Productions, Inc. v. Gary Saderup, Inc.* 25 Cal. 4th 387, 399 (2001), *cert. denied by Saderup v. Comedy III Prod., Inc.*, 534 U.S. 1078 (2002).

D. Section 230 Does Not Immunize ISPs for Claims Arising from Right of Publicity Violations

The plain language of Section 230(e) is clear. It is to be interpreted in a manner that does not limit any law pertaining to intellectual property and it does not prevent any State from enforcing its laws consistent with the Section. To expand application of Section 230(c)'s immunity to a state intellectual property right, namely the right of publicity, clearly contravenes the intent and plain language of Section 230(e) by limiting a state law pertaining to

intellectual property.

As the right of publicity is a form of intellectual property the state law scheme of protection is not inconsistent with Section 230. Accordingly, immunity should not apply to an ISP in a right of publicity case.

II The Ninth Circuit's Opinion Has Far-Reaching Implications Well Beyond the Scope of this Case

The Internet is a burgeoning outlet for the distribution of content that is growing exponentially. New technologies and new business models for the distribution of content – especially content that exploits individuals' rights of publicity – are being announced at a breakneck pace. Most of these technologies and models could hardly have been imagined just a year or two ago, let alone a decade ago when the CDA was passed and the Internet was still a new, unexplored, frontier. The effects of the Ninth Circuit's Opinion, if not reversed, will be far-reaching and felt for years to come.

Websites that distribute and promote user-generated content are quickly becoming outlets for more and more misappropriated content. One need only look at the recent case and news stories related to websites such as Google's YouTube or Wikipedia for a glimpse at the future. These websites survive, and even thrive, as a result of content contributed by their users, whether or not those users have the legal

right to contribute the content. Their very business models are based on being passive providers of that content – they bury their head in the sand and ignore the infringement going on around them, yet reap its financial rewards.

Under the Ninth Circuit's decision, if an individual's rights of publicity are infringed and exploited on one of these myriad websites, the aggrieved individual is potentially left without any remedy. Although the individual's rights have been infringed, his or her sole remaining remedy may be to pursue legal action against a judgment-proof website user, assuming that user can even be located, rather than against the party who is profiting from that infringement. Not only would the website operator have no legal duty to respond to the individual's request to remove the content, the lack of consequence leaves no incentive for it to do so. Surely this was not Congress' intent in enacting the limited immunity embodied in the CDA.

The effect of the Ninth Circuit's opinion is not only to greatly diminish the right of publicity, but to effectively cut off *any* state law intellectual property claims against parties who are profiting from the infringement. Instead, the injured party is left to chase shadows, pursuing claims against infringers whose identities are often cloaked and who, as likely as not, are not the parties reaping the profit of their infringement. In the new online world, under the Ninth Circuit's decision, the party profiting the most from the unlawful act is left to reap the most reward

with the fewest consequences.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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